(3)

No. 90-504

In The
Supreme Court of the United States
October Term, 1990

FLEET FACTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE*
BANK OF BOSTON, BANK OF NEW ENGLAND,
CONNECTICUT NATIONAL BANK, FIRST INTERSTATE BANCORP,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE CO. OF AMERICA,
SHAWMUT BANK, N.A,
TEACHERS INSURANCE & ANNUITY
ASSOCIATION OF AMERICA,
AND TRAVELERS REALTY INVESTMENT CORPORATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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October 22, 1990

QUESTION PRESENTED

Whether the express exemption from CERCLA liability for secured lenders, who hold indicia of ownership primarily to protect their security interest, and who do not participate in the management of a facility, can be interpreted to hold secured lenders liable for hazardous waste site cleanups if they neither foreclose on any of the borrower's real property, nor participate in the day-to-day management of the facility but who may have had the authority to get involved in or otherwise influence the hazardous waste disposal decisions if they so chose?

CONSENT OF THE PARTIES

Counsel for Fleet Factors Corporation and the Solicitor General's office on behalf of the United States consented to the filing of this brief in support of the Petition for Writ of Certiorari. Written copies of those letters of consent were filed with the Clerk of this Court at the time the Brief of Amici Curiae was filed.

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INTEREST OF *AMICI CURIAE*

The *Amici Curiae* are directly affected by the decision in this case due to their extensive presence in commercial lending. More specifically their interests are as follows:

Bank of Boston, with headquarters in Boston, Massachusetts, is the largest bank in New England. It is a full service bank with assets in excess of $19 billion in real estate lending as well as inventory, equipment, leasing and accounts receivable lending.

Bank of New England, with headquarters in Boston, Massachusetts, is a major full service bank with substantial

assets in real estate lending as well as inventory, equipment, and accounts receivable lending.

Connecticut National Bank, based in Hartford, Connecticut, is an indirect subsidiary of Shawmut National Corporation, which is also based in Hartford, Connecticut. It is a full-service bank with substantial assets in real estate, as well as inventory, equipment and accounts receivable lending.

First Interstate Bancorp, with headquarters in Los Angeles, California, is as of June 30, 1990, the tenth largest banking organization in the United States, owning 25 banks located throughout the Western United States, which in the

aggregate hold assets of $55.1 billion and operate 1,053 offices. Twenty-two of those banks are full service banks with substantial amounts of real estate lending, as well as inventory, equipment, and accounts receivable lending.

John Hancock Mutual Life Insurance Company, with headquarters in Boston, Massachusetts, is the ninth largest insurance company in the United States. It has more than $32 billion in assets, of which more than $10 billion is in loans secured by mortgages on real estate throughout the nation and more than $10 billion is in loans secured by bonds.

New England Mutual Life Insurance

Company (The New England) is one of the nation's largest diversified financial and money-management institutions, with headquarters in Boston, Massachusetts. It has over $4 billion invested in mortgage loans secured by real estate throughout the country as well as substantial assets secured by inventory, equipment, and other personal property.

The Prudential Insurance Company of America (Prudential), a mutual life insurance company, with headquarters in Newark, New Jersey, includes among its investment activities secured lending on commercial real estate. As of May 30, 1990, Prudential's commercial mortgage loan

portfolio included loans with an aggregate principal balance of approximately $22 billion.

Shawmut Bank, N.A., based in Boston, Massachusetts, is an indirect subsidiary of Shawmut National Corporation which is based in Hartford, Connecticut. It is a full-service bank with substantial assets in real estate, as well as in inventory, equipment, and accounts receivable lending.

Teachers Insurance and Annuity Association of America, based in New York, New York, is the fifth largest life insurance company in the United States and the principal pension provider in the higher education market with over $19 billion

invested in loans secured by mortgages or real estate throughout the United States.

Travelers Realty Investment Corporation, based in Hartford, Connecticut, is a subsidiary of The Travelers Corporation. It manages a real estate investment portfolio of $17 billion.

Together the amici have substantial assets tied up in commercial lending across the United States. They have substantial security interests in real and personal property, including tangibles and intangibles.

INTRODUCTION AND STATEMENT OF THE CASE

The *Amici*, Bank of Boston, Bank of New England, Connecticut National Bank, First Interstate Bancorp, John Hancock Mutual Life Insurance Company, New England Mutual Life Insurance Company (The New England), The Prudential Insurance Company of America (Prudential), Shawmut Bank, N.A., Teachers Insurance and Annuity Association of America, and Travelers Realty Investment Corporation adopt and incorporate by reference the Statement of the Case of Fleet Factors Corporation in its Petition for Writ of Certiorari.

The Comprehensive Environmental

Response, Compensation, and Liability Act [CERCLA] 42 U.S.C.A. § 9607(a) (West Supp. 1990) provides that present owners and operators of a vessel or a facility, and owners or operators at the time of disposal of hazardous substances, shall be liable for all the response costs to remove and remediate the hazardous substances consistent with the national contingency plan. This has been interpreted to impose strict, joint and several liability on any party that could be considered to be involved in the operation or to have an ownership interest in the property. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. ChemDyne*

Corp., 572 F. Supp. 802 (S.D. Ohio 1983). However, CERCLA has a specific exemption for secured lenders. The term "owner or operator"

> does not include a person, who, without participation in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA § 101(20)(A), 42 U.S.C.A. §9601(20)(A) (West Supp. 1990).

In the case at issue, *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), the Eleventh Circuit expressly set a standard interpreting this exemption which greatly expands the situations in which a lender might be found liable. Applying its

new standard, the Eleventh Circuit not only upheld the portion of the District Court's opinion which held that there were material issues of fact as to whether Fleet Factors Corporation ("Fleet") participated in management for one time period, but it also reversed another portion of the District Court opinion, expanding the time periods Fleet might potentially be held liable under CERCLA.

Amici submit that the standard set by the Eleventh Circuit is clearly erroneous and it is having a substantial impact beyond the determination of the interests before this Court. Many lenders are already restricting lending or backing away from troubled

borrowers in anticipation of expanded liability for Superfund cleanups. The result is an impending credit drought for borrowers which will undermine the health and growth of almost every type of business. A subsequent decision by the Ninth Circuit imposes a much different threshold for liability, creating conflict and ambiguity. In addition, there are an increasing number of CERCLA cases in the lower courts, requiring the guidance of this Court on the issue of lenders' liability. Therefore it is of great importance that this Court hear this case to restore certainty to commercial lending.

SUMMARY OF ARGUMENT

This Court should grant the Petition for

Writ of Certiorari of the Fleet Factors Corporation because the issues involved in this case are of extraordinary importance to borrowers and lenders throughout the country. The Eleventh Circuit decision has created a situation of uncertainty and ambiguity which is having an increasingly negative impact on the national and local economies. Any fair reading of the decision below leads to a conflict between the Eleventh and Ninth Circuit interpretations of the secured lender exemption. In addition, the Eleventh Circuit erred on the law by failing to properly analyze Fleet's status as an owner or operator before turning to the exemption and by reading the

exemption in such a way as to make it meaningless. Finally, this Court should grant the Petition because the decision below undermines the policy behind the CERCLA law and is bad public policy in general.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION PRESENTS AN ISSUE OF EXTRAORDINARY IMPORTANCE TO COMMERCIAL LENDERS ACROSS THE UNITED STATES.

In this case, the Eleventh Circuit went far beyond the facts of the case to set an new, expansive, and extra-statutory standard for lender liability under CERCLA. That court interpreted the statutory exemption for secured lenders in such a way as to

essentially eliminate the protection that lenders believed they had under the exemption, thereby stepping into the legislative role and rewriting the law. The result of this decision has been an immediate and serious negative effect on lending practices and the economy throughout the United States.

The *Amici*, all of whom are major commercial lenders, assert that this decision raises the specter of virtually unlimited liability for lenders for hazardous waste site cleanup. In response to that decision, some lenders have already changed their lending practices, others are seriously considering making changes. The first change is a

significant curtailment in making loan commitments to any commercial enterprise, particularly small businesses, which might develop a hazardous substance problem. The second change is an increased reluctance to assist troubled borrowers in a workout situation if there is any potential of a hazardous waste problem. Together these changes will have an increasingly negative effect on the national and local economies. Ultimately they will undermine the purpose of CERCLA as fewer businesses will have the funding available to clean up hazardous waste problems.

Prior to the *Fleet Factors* case, the standard set forth in *United States v.*

Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985), was widely followed. *Fleet Factors*, 901 F.2d at 1556 (Court refers to the *Mirabile* test and cites other lower court cases which followed it: *United States v. New Castle County*, 727 F.Supp. 854, 866 (D. Del. 1989); *Rockwell International v. IU International Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1204-05 (E.D.Pa. 1989); *Guidice v. BFG Electroplating and Manufacturing Co.*, 732 F.Supp. 556 (W.D.Pa. 1989)). Under that standard a secured lender could remain within the secured lender exemption if it provided some financial advice to a troubled

borrower so long as it did not become involved in day-to-day management of the company. *Mirabile*, 15 Envtl. L. Rep. at 20995. That was a more workable standard for lenders. It gave them some idea of what action they might take to protect their security interest without losing their statutory protection.

The Eleventh Circuit decision was the first federal appeals court review of the secured lender exemption. In it, a quorum of the appellate court panel, consisting of one appeals court judge and a senior district judge sitting by designation,[1] set forth a

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[1] This case was argued before a panel consisting of Circuit Judges Vance and Kravitch and Senior (continued...)

standard for determining lender liability that is far more expansive than the standard that had generally been followed previously:

> *A secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.* It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable –although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, *a secured creditor will be liable if its involvement with the management of the facility is*

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[1] (...continued)
District Judge Lynne of the U.S. District Court for the Northern District of Alabama, sitting by designation. Judge Vance died prior to a decision on the case. The case was decided by Circuit Judge Kravitch and Senior District Judge Lynne.

> *sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.*

Fleet Factors, 901 F.2d at 1557-8 (emphasis added).

Because any standard loan documents will give the secured creditor the potential "capacity to influence the corporation's treatment of hazardous wastes," the result is a standard under which it appears that a secured lender may be held liable merely by exercising rights under the loan documents far short of actual control, such as giving advice. For instance, typical loan documents have a clause which provides that the borrower must be in compliance with all applicable laws. Therefore, if the borrower

treats hazardous substances in any way which violates the law, theoretically the lender could call a default on the loan. From that, it could be inferred that the lender could influence hazardous waste decisions. Similarly, lenders typically have a right to inspect the premises under the loan documents. It is conceivable under the Eleventh Circuit standard that merely entering into the loan agreement with such "compliance-with-law" or "right to inspect" clauses and other clauses giving the lender some control of the business in the event of default could be sufficient participation in the facility's financial management for a lender to be held liable. The clear

implication of the standard is that a lender cannot give a troubled borrower any advice or take any action other than asking for repayment of the loan without opening itself to liability for the cost of the entire hazardous waste site cleanup.

The Eleventh Circuit ignores or misunderstands the nature of secured lending. Secured lenders are not owners of the business. They take a security interest in real or personal property and have certain rights under the loan documents in order to be able to lend money, for which they are typically fiduciaries, with some degree of safety. By making it more risky for lenders to take a security interest than

not, the Eleventh Circuit standard undermines the concepts that underlie this realm of financing.

This expansion of liability from the "day-to-day management" standard of *Mirabile* to the "inference that [the lender] could affect hazardous waste disposal decisions if it so chose" standard of *Fleet Factors* has led to tremendous uncertainty in the lending community as to what, if anything, a secured lender may do to protect its security interest without potentially incurring liability far beyond the scope of the loan. As the Eleventh Circuit was the first Court of Appeals to address this issue and the recent Ninth Circuit decision in *In re*

Bergsoe Metal Corp., 910 F.2d 668, 31 ERC 1785 (9th Cir. 1990) fails to clearly repudiate this standard or to give clearer guidelines, the lending community feels that there is a serious danger that lower courts and possibly other circuits may follow the *Fleet Factors* standard.

The degree of concern the lending community is experiencing over this decision is reflected in the commentary concerning the case. "In a case of first impression, the U.S. Court of Appeals for the Eleventh Circuit May 23 broadened secured creditor liability under the superfund law, specifically rejecting a narrower formulation known as the *Mirabile* rule." *Secured Creditor*

CERCLA Liability Expanded as Appeals Court Rejects 'Mirabile' Approach, Toxics Law Reporter (BNA) Vol. 5, No. 1 at 16 (June 6, 1990). "Lenders already know they must be 'very cautious' in accepting land as collateral,' [Bradley S.] Tupi said. Now, they will have to expect attorneys to advise them that when a loan 'looks like it is going sour, they are in a no-win situation. They should just walk away and not get involved in the borrower's business.'" *Id.* at 17, *quoting* an attorney with the Pittsburgh firm of Reed Smith Shaw & McClay. "A recent federal court ruling--*U.S. v. Fleet Factors Corp.*--delivers a new and potentially devastating blow to banks. The ruling

drastically expands 'lender liability' under the Superfund law...." Connolly, Wall St. J., Aug. 28, 1990 at A10.

In summary, the effects of this case are being felt far beyond the confines of the Eleventh Circuit. Many lenders, who do not take an equity risk in businesses and who consequently do not receive an equity return on their investment, feel they cannot in good conscience expose their institutions to potential liability far in excess of the loan they made. Given the general uncertainty generated by the Eleventh Circuit's decision, the lending community is responding to the potential for CERCLA liability by changing lending practices to the detriment of the

economy.

II. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH A NINTH CIRCUIT DECISION ON THE SECURED LENDER EXEMPTION.

In August 1990, the Ninth Circuit addressed the scope of the secured lender exemption in the *Bergsoe* case. *In Re Bergsoe*, 910 F.2d 668 (9th Cir. 1990). The case involved a public authority which held nominal title to a plant at which a hazardous waste problem arose. The Ninth Circuit cited the standard set forth in *Fleet Factors* and noted that it (the Ninth Circuit) would "leave for another day the establishment of a Ninth Circuit rule on this difficult issue." *Id.* at 672. However, the

Ninth Circuit then went on to say that it is clear from the statute that while the precise parameters of "participation" were undefined, "there must be *some* actual management of the facility before a secured creditor will fall outside the exception." 910 F.2d at 672.

The Ninth Circuit purports to avoid setting a standard for what participation will put a secured lender outside the exemption. But, in fact, by requiring as a minimum "some actual management of the facility," it is setting at least a threshold standard that conflicts with the Eleventh Circuit opinion. Under the Eleventh Circuit decision, a court may *infer* that a secured lender could affect hazardous waste

disposal decisions if it so chose, from the fact that the lender participated in financial decisions to some degree. As stated in the previous section, standard loan provisions in and of themselves seem to give a lender sufficient authority to affect hazardous waste disposal decisions if it so chose.

The *Bergsoe* court specifically rejects financial participation such as negotiating and encouraging the building of the facility; the right to inspect the premises and to take possession upon foreclosure; and participation in an agreement for a change in management during a workout, as bases for holding the secured creditor liable. *Bergsoe*, 910 F.2d at 672. In contrast the

Fleet Factors decision suggests that even remote participation in financial matters, coupled with the authority to influence hazardous waste disposal, is sufficient to find liability.[2]

Not only does the *Fleet Factors* decision conflict with the Ninth Circuit decision, but as the Eleventh Circuit noted itself in the *Fleet* opinion, it is a distinct departure from the series of cases in which lower courts

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[2] The Ninth Circuit gives the Eleventh Circuit decision the benefit of the doubt when it notes, "As did the Eleventh Circuit in Fleet Factors, we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes." Bergsoe, 910 F.2d at 673, n. 3. It is clear, however, from reading the cases in their entireties that the Ninth and Eleventh Circuits have very different views as to what constitutes the exercise of actual management authority.

over the past five years followed the *Mirabile* standard of secured lender liability, requiring actual foreclosure or day-to-day management before a secured lender would be held liable. *Fleet Factors*, 901 F.2d at 1556. That line of cases had created some parameters within which lenders felt it was safe to act. The Eleventh Circuit decision has undermined any certainty that lenders may have felt they gained from these cases.

III. THE STANDARD FOR SECURED LENDER'S LIABILITY SET FORTH BY THE ELEVENTH CIRCUIT IS CLEARLY ERRONEOUS.

The Eleventh Circuit decision is clearly erroneous for a number of reasons. First, the court did not properly address the

question of whether Fleet was an "owner or operator" before moving to consideration of the exemption. Second, the court rewrote the language of the statute as to when liability may be imposed on a lender, interpreting the secured lender exemption in such a way as to make it virtually meaningless.

CERCLA holds those people who are owners and operators liable for the costs of responding to a hazardous waste site problem. The statute then exempts from liability secured lenders who are primarily protecting their security interest and who do not participate in management. As a threshold matter, a court must determine

whether a lender should be considered an owner or operator and then move on to whether the lender is protected by the exemption. In *Fleet Factors*, the court did not make a finding that Fleet was an owner or operator before moving on to consider whether it could benefit from the exemption. The court specifically notes that while it might have found Fleet liable as an operator it was forgoing the operator analysis in this opinion. *Fleet Factors*, 901 F.2d at 1556, n. 6. The court did say that there was no dispute that Fleet held indicia of ownership, so that it would proceed to an analysis of Fleet's participation in management. *Id.* at 1556. The result ignores previous case law

which did not deem a lender an "owner" until it actually foreclosed on its interest. *See United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 579 (D. Maryland 1986); *Guidice v. BFG Electroplating and Mfg. Co. Inc.*, 732 F. Supp. 556, 562-3 (W.D. Pa. 1989). In *Mirabile* a bank was held to be exempted from liability even though it actually foreclosed on the property. 15 ELR at 20,996. Similarly, in *Bergsoé* the local authority which held nominal title to the property was held not to be an owner for purposes of CERCLA liability. 910 F.2d at 671. The court may have simply assumed that Fleet was an "owner" because Georgia

is a state in which mortgagees are title holders. However, this assumption would lead to varying interpretations from state to state and it still does not square with *Bergsoe*.

In *Fleet*, the court jumped to the language of the exemption to find potential liability, using the exemption as a weapon rather than a shield. The Eleventh Circuit erred in not squarely addressing the question of whether or not Fleet was an owner or operator, before determining how the exemption applied.

The Eleventh Circuit is guilty of exactly what it accuses the District Court of doing--ignoring the plain language of the statutory

exemption for secured lenders in such a way as to render it virtually meaningless. *Fleet*, 901 F.2d at 1557. The Eleventh Circuit cites the "overwhelmingly remedial" goal of CERCLA in coming to its expansive scheme of liability for lenders (*id.*), but Congress would not have included this exemption in the statute if they had not intended for it to provide some protection to lenders beyond that afforded other owners and operators.

Further, the court departed from previous cases and created further ambiguity by failing to recognize the distinction between the lender's actions with respect to real and personal property.

IV. THE ELEVENTH CIRCUIT DECISION UNDERMINES THE BASIC PURPOSE OF CERCLA AND IS BAD PUBLIC POLICY.

The decision undermines the basic purposes of CERCLA. As lending institutions restrict loans to any businesses that might have a hazardous waste problem and particularly as lenders become unwilling to assist a borrower in a workout situation, there will be less funding available for private parties to clean up hazardous waste sites. The result will be delays and a greater drain upon the public monies in the Superfund. Lenders have neither the experience nor the desire to stand over the shoulder of their borrowers to make sure

that each and every decision the borrower makes with regard to hazardous substances is correct.

The decision below presents lenders with a Hobson's Choice. They may either stay completely uninvolved with the borrower, risking their security interest but avoiding CERCLA liability, or they may get involved to the point of almost running the business in order to meet the role set out for them in *Fleet Factors*, but thereby almost certainly becoming liable for even an accidental spill. The latter role is one which lenders do not have the capacity or expertise to undertake. Under the Eleventh Circuit standard a concerned lender that does ask a borrower

for a periodic accounting in connection with hazardous waste substances could thereby become subject to CERCLA liability. Therefore, the net result of the standard is to encourage lenders to distance themselves from borrowers' operations, particularly if there is any indication that a hazardous waste problem may be arising. Simply stated, the *Fleet Factors* rule does not accomplish its stated purpose of encouraging lenders to police the actions of their borrowers.

The police function which the Eleventh Circuit would assign to lenders is far more appropriately assigned to the government which has various state and federal

regulations to deal with the treatment of hazardous materials, the expertise to enforce those regulations, and the ability to impose criminal sanctions if necessary.

Finally, the tremendous uncertainty and ambiguity that have resulted from this decision have had a serious negative impact on the relationship between borrowers and lenders that ultimately is bad for the economy. That result was not intended by the legislature.

CONCLUSION

For the reasons stated in this brief, the *Amici Curiae* request this Court to grant the writ of certiorari to review the judgment of

the Eleventh Circuit filed by the Fleet Factors Corporation.

BANK OF BOSTON, BANK OF NEW ENGLAND, CONNECTICUT NATIONAL BANK, FIRST INTERSTATE BANCORP, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, SHAWMUT BANK, N.A., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, TRAVELERS REAL ESTATE INVESTMENT CORPORATION

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